



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

FAMILY DIVISION

SUCCESSION CAUSE 2757 OF 2011

(IN THE CHIEF MAGISTRATE'S COURT KIAMBU SUCCESSION CAUSE NO. 276 OF 2009)

IN THE ESTATE OF JOHN MUIRURIMUNIU

JULIUS MWANGI MUNIU.....1ST APPLICANT

SAMUEL MBITIRU KIMANI.....2ND APPLICANT

VERSUS

LUCY WANJIRU NJOGU.....1ST RESPONDENT

ALLAN MUCHAI WANJIKU.....2ND RESPONDENT

JUDGMENT

INTRODUCTION

The deceased in this matter died intestate on the 14th February 2009 at the Kiambu District Hospital.

The grant for letters of administration intestate were granted on 8th December 2009 to Lucy Wanjiru Njogu and Allan Muchai Wanjiru and confirmed on 20th January 2010.

On the 31st December 2011, Julius Mwangi Muniu and Joseph Mburu Muniu, brothers to the deceased filed summons for the revocation or annulment of grant issued to Lucy Wanjiru Njogu and Allan Muchai Wanjiru on the grounds that;

- a. The grant was obtained fraudulently by making of false statements or by the concealment from the court of something material to the case.**
- b. The first Administrator was not related to the deceased in any way and was not a lawful dependant and neither were the other named dependants true dependants of the deceased.**
- c. The grant was obtained by means of an untrue allegation of a fact essential on a point of law to justify the grant.**

HEARING

Julius Mwangi Muniu and Joseph Mburu Muniu informed Court that the deceased lived on the land with them. He was not married and he did not have children. He did not marry Lucy Wanjiru Njogu and the 3 children are not children of the deceased. The birth certificates presented in Court were obtained in 2010 after the deceased's death. The place of birth is Lari where the 1st Respondent hails from and not Githunguri where the deceased's family is.

After John Muiruri Muniu's death, the deceased's father and brothers were summoned to the Chief and they were interrogated on why they grabbed land from the Respondent and sent her away from the home. They explained that the 1st Respondent was not married to the deceased and she never lived on the property. The land in question was distributed to 5 sons of the deceased's father. The deceased built a house on his portion. The deceased's mother died in 1995 and father in 2011 and the 1st Applicant is the administrator of the father's estate and has with him the original titles of the land that is now transferred to the 1st Respondent. The 1st Respondent took out letters of administration on the premise that she had been married to the deceased under Kikuyu customary law and she had children by the deceased.

Samuel Mbitiru Kimani the Assistant Chief of Githiga location for over 20 years, stated that he knew the deceased and his family and confirmed he was a young man who had a good time but was never married. Lucy Wanjiru picked tea in the area and lived in a rented house and not with the deceased.

Peter Kamau Ngugi a family friend told the Court he knew the deceased's family from the time the children were born. He knew the deceased worked within the village and lived on his father's land. As a neighbor he never heard or saw the deceased's nuclear family. The deceased was not married and he did not participate in any ceremony of Kikuyu customary law where the deceased married anyone.

The 1st Petitioner/Respondent Lucy Wanjiru Njogu testified on the 30th September 2015 and stated that John Muiruri Muniu was her husband and they married in 1990. They lived in Githiga and later shifted to Kagaa and had three children together, namely Mary Wanjiru, Peter Njogu and Samuel Muniu. The 1st Respondent produced birth certificates of Samuel Muniu issued on 30th March 2011 and Peter Njogu issued on 13th September 2010.

After living together in 2000 the deceased and his father visited her home in Rungiri Kagaa in Lari, Kiambu County. According to the Petitioner, their family were with one Edward Muniu, Mary Ngugi and Margaret Muceera among other six people who attended the ceremony including the Petitioner's father. The deceased paid Kshs. 5,000 and they agreed that he had paid "*ithigi*". The Petitioner went with the deceased and lived in the deceased's home at Githiga from 2003 to 2009. They built their home on the deceased's father's land. The deceased's father subdivided the land and gave the deceased **Githunguri/Gathangari/2613 & 2622**.

The Petitioner stated that after the deceased's death, she went to the Chief and got a letter and went to Court to file a Petition for grant and later confirmation of grant in 2010. She confirmed that she applied for grant of letters of administration with one Allan Muchai Wanjiku who had no interest in the land.

Peter Njogu George, the father of the 1st Respondent stated that he knew the deceased and he came to his home with his father in 2000 in the company of 5 people. He was with Lawrence Njihia, Boniface Njuguna and his wife Mary Nyakeri and another lady called Elizabeth Wanjiru. They were paid Ksh. 5,000/- as "*Kuhanda ithigi*" and the ladies were given money to buy refreshments. He confirmed that the 1st Respondent had 2 children of her own but the 3rd child Samuel Muniu was born after their marriage under Kikuyu customary law. There were few problems but after the deceased died, the deceased's brothers were a problem. They sent her away from the home.

Lawrence Loko Njihia and Boniface Njuguna Muthoga testified that the 1st Respondent came to her home with visitors who included the deceased. They were part of the group that was with the Respondent's father at the ceremony. The deceased's father paid Ksh 5,000/- as initial sum, '*kuhanda*

ithigi' and they were to come back later but they did not as the deceased died.

DETERMINATION

The issues are whether the Petitioner was married to the deceased under Kikuyu customary law, whether the children belong to the deceased and if the 1st Respondent and the children are entitled to the deceased's estate.

It is not contested that the deceased and his brothers and parents lived on the same land, which was later subdivided, and each of the sons of their deceased's father got their share of the land.

What is hotly contested is the issue of whether the 1st Respondent was married to the deceased. The evidence from the 1st Respondent, her father and 2 elders from her home area is that in 2000, the deceased, his late father and other people visited her home and paid ksh.5, 000/= as 'kuhandaithigi'. This fact is contested by the Applicants, Chief, family friend and neighbour that the deceased was not married. Even if they did not attend the ceremony they would have known about it. Further it has also been denied that the 1st Respondent lived on the deceased's father's land and with the deceased at his house.

The essentials of a Kikuyu customary marriage are codified in **Restatement of African Law on the Law of Marriages and Divorce by Eugene Cotran**. These essentials include; capacity to marry, consent of parties, ceremonies of 'ruracio' 'ngurario' and commencement of cohabitation. In the instant case if as alleged the deceased went with his father to the deceased's home and only conducted the first initial ceremony 'kuhanda ithigi' this ceremony did not constitute a marriage between the deceased and the 1st Respondent under customary law.

This is because as illustrated in the following case, the essentials of a kikuyu customary law were completed especially 'ruracio'; payment of dowry. In **THE ESTATE OF JOSEPH GATHIGO (DECEASED) PRISCILLA WARUGURU GATHIGO vs VIRGINIA KANUGU GATHIGO (2004) eKLR** Hon. Lady justice H. Okwengu stated as follows;

I find the evidence adduced by the protestor on proof of alleged marriage to the deceased fell short of proving the alleged marriage...there was no independent witness to customary formalities. There was no evidence that the elders from the deceased relatives who participated in the said marriage. There was no evidence that a 'ngurario' ram was slaughtered. The Court finds there was no marriage between the deceased and Respondent

This Court is of the view that the deceased and Respondent were not married. The alleged Kikuyu customary ceremony did not conform to the various steps undertaken to culminate to such a ceremony as required by the law as stated above.

From the evidence on record, if there was a ceremony at the Respondent's home by the deceased's family none of the elders from the deceased's family or home confirmed the same. Further, there is no evidence that dowry; 'ruracio' was paid and 'ngurario' ram was slaughtered.

The second issue is whether the 3 children were children of the deceased. The father of the 1st Respondent confirmed to Court that Mary Wanjiru and Peter Njogu were Lucy Wanjiru's children and after marriage the deceased and Respondent had Samuel Muniu in 2006. The 1st Respondent produced birth certificates of Samuel Muniu issued on 30th March 2011 and Peter Njogu issued on 13th September 2010. The validity of the birth certificates issued is questionable. based on the fact that the alleged father had already died when they were issued. The Court notes with concern that the birth certificates were obtained after the deceased's death in 2009.

Secondly, even after the 1st Respondent procured birth certificates for the 2 children out of 3 children, knowing the deceased was not the biological father especially of Peter Njogu, the 1st Respondent's father confirmed to Court that Peter Njogu was born before his daughter and the deceased were married. To

produce a birth certificate of Peter Njogu with the deceased's name knowing the deceased did not sire him is to blatantly lie to Court. It is noteworthy that Peter Njogu is named after the 1st Respondent's father and not the deceased's father if he was his biological father. Under kikuyu customary law the first child from a union is named after father or mother of the husband. Peter Njogu was born in 1992 yet the 1st Respondent told the Court they met with deceased in 1990. The child if deceased's was not named in his family.

With regard to Samuel Muniu who was born in 2006, the Applicants vehemently contested paternity but the 1st Respondent produced the birth certificate issued in 2011 after the deceased's death in 2009. It is difficult for this Court to conclusively determine paternity of the child as deceased's. There is no independent evidence the 1st Respondent lived with the deceased at his home. No one knew of the child or the child as deceased's child. There is no evidence that even if he was not the biological father he acquired responsibility for the child. There is no evidence to confirm that the 1st Respondent lived with the deceased on their father's land. So that in the absence of any concrete evidence to confirm this child as the deceased's, his claim to part of the deceased's estate must fail.

Section 29 of the Law of Succession Act Cap160 Laws of Kenya provides;

For the purpose of this Part, "dependant" means-

a) the wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death;

b) such of the deceased's parents step-parents, grand-parents, grandchildren, step-children, children whom the deceased had taken into his family as his own, brothers and sisters, and half-brothers and half-sisters, as were being maintained by the deceased immediately prior to his death; and

c) where the deceased was a woman, her husband if he were being maintained by her immediately prior to the date of her death.

The children were not dependents of the deceased. After carefully analyzing the evidence that has been presented to this court, it is evident that although the petitioner claims that she had been married to the deceased she has presented no substantial evidence to support this fact. Neither has she been able to prove the paternity of her children as the deceased's children. All the witnesses she has presented on the issue of Kikuyu customary law were her own relatives and there was no independent witness except for the elders from Lari, Kiambu who still cannot vouch for her as being a resident of Githunguri, and the place where the deceased was known to reside.

There is also the disturbing fact that the 2nd Respondent has never entered appearance to these proceedings. He did not attend Court or testify. Yet it is on record that he jointly applied for grant of letters of administration with the 1st Respondent over the deceased's estate. His relationship to the deceased is questionable as he could only have been an administrator by virtue of **Section 66 of the Law of Succession Act Cap 160**. He has not established his identity and relationship to the deceased. In the absence of such evidence, this Court finds his appointment as one of the administrators of the deceased's estate irregular and invalid.

After careful consideration of all the evidence presented to this court by both the Petitioner and the Objectors I have come to the conclusion that the Grant for letters of administration of the late John Muiruri Muniu estate and the confirmed grant were obtained fraudulently by making false statements and by concealment from Court of material facts to the case contrary to **Section 76 (b) of the Law of Succession Act Cap 160**.

DISPOSITION

Based on the above analysis I grant the following orders,

- 1. That the Grant of Letters of Administration confirmed to Lucy Wanjiru Njogu and Allan Muchai Wanjiru by the Kiambu Resident Magistrate Court at Kiambu on the 08th December 2009 and confirmed on 20th January 2010 are hereby revoked and annulled forthwith.**
- 2. A paternity test should be taken in order to prove whether the petitioner's last-born child Samuel Muniu is the child of the deceased.**
- 3. The parties are at liberty to apply for fresh Grant of Letter of Administration.**
- 4. The costs are in the cause.**

DELIVERED SIGNED AND DATED IN OPEN COURT AT NAIROBI THIS 16th DAY OF SEPTEMBER 2016

MARGARET W. MUIGAI

JUDGE

In the presence of;

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